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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
CONSIST SOFTWARE SOLUTIONS, INC., :  
f/k/a CONSIST INTERNATIONAL, INC., :  
: 07 CV 7047 (CM) (FM)  
Plaintiff, :  
-against- : STATEMENT OF  
: DIRECT TESTIMONY  
SOFTWARE AG, INC. and SOFTWARE AG, : OF JAMES DALY  
:   
Defendants. :  
-----X

Pursuant to the Court's September 26, 2007 Scheduling Order and Rule I of the Court's Individual Practices, plaintiff submits the following as its narrative statement of the direct testimony of James Daly, as excerpted from Mr. Daly's November 13, 2007 deposition in this action:

[4:16] - [4:17]

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16 Q And how many times have you been deposed?  
17 A Oh, I would say about three or four.

[5:1] - [5:17]

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1 Q Okay. Now, would you state your full  
2 name and your address for the record, please.  
3 A Okay. My full name is James Henry Daly,  
4 D-A-L-Y, and my address is 2465 Centreville, that's  
5 C-E-N-T-R-E-V-I-L-L-E, Road in Herndon, Virginia  
6 20171.  
7 Q Thank you.  
8 Now, have you done anything to prepare  
9 for your deposition here today?  
10 A I had one meeting with Mr. Basinger a  
11 week ago today, and other than that, I haven't done  
12 anything.  
13 Q Did Mr. Basinger show you any documents?  
14 A Yes, we reviewed some letters --

15 Q Okay.  
 16 A -- between myself and Consist or  
 17 Mr. Fridman.

[6:15] - [6:17]

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15 Q What year did you get your JD degree --  
 16 A '81.  
 17 Q -- from George Mason? 1981?  
 18 A 1981, right.

[13:18] - [14:7]

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18 Q Okay. And after you departed from MITRE  
 19 Corporation, what did you then do?  
 20 A That's when I arrived at Software AG. I  
 21 was at MITRE from around April of '88 through  
 22 almost the end of the year '91.

page 14

1 The November, December time frame of '91  
 2 I was called by Mr. King, the then president of  
 3 Software AG North America, who asked me if I would  
 4 come in on an hourly basis and help him out. He  
 5 had to just let his prior general counsel go,  
 6 terminate him, so he asked me if I would come in on  
 7 an hourly basis.  
 8 Mr. King and I had worked together at the  
 9 Martin Marietta Data Systems division, and he knew  
 10 my work very well and I knew him very well, so he  
 11 called me when he needed someone.

[14:12] - [18:17]

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12 Q And Mr. King asked you to come in on an  
 13 hourly basis to function as general counsel?  
 14 A No. They had some important transactions  
 15 in the works and they were lawyerless, so he asked  
 16 me if I would come in and just help out on a few  
 17 transactions. So I came in and, on an hourly  
 18 basis, and worked on those transactions. They were  
 19 either civilian contracts between nongovernmental  
 20 entities or they were government -- responses to  
 21 government requests for proposals or the filing of  
 22 government schedules.

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1 Martin Marietta had a, what's referred to  
 2 as a schedule contract with the government, and  
 3 that's where you have a permanent contract with the  
 4 government and they -- the government can sort of  
 5 buy from a menu.

6 They had a number of these transactions  
 7 in process when he was forced to let his prior  
 8 general counsel go, and so he asked me to come in  
 9 and help on those, get them finished up, completed,  
 10 concluded, whatever the proper term is.

11 Q Well, is it fair to say that your job  
 12 there at that point was contract negotiation and  
 13 drafting?

14 A Yes, that was -- that was most of it,  
 15 yes.

16 Q Okay. And the company that you were  
 17 actually asked to come in to work for was Software  
 18 AG North America; is that right?

19 A Right, Software AG of North America, Inc.

20 Q Now, what was the legal status of  
 21 Software AG North America at that point? Was it an  
 22 independent company or was it a subsidiary of

page 16

1 another company?

2 A No, it was -- it was an independent  
3 company.

4 Q Okay.

5 A It was at that time a Virginia  
6 corporation and it had the exclusive  
7 distributorship in its territories for these  
8 Software AG products from the owner of those  
9 products, Software AG of Darmstadt, Germany.

10 Q And the exclusive distributorship that  
11 Software AG of North America held comprised which  
12 territories to your recollection?

13 A Okay. It consisted of all of North  
14 America, so Canada, the U.S., Mexico, all of  
15 Central America and all of South America. It  
16 included territories in the Far East, so it  
17 included Japan, and it included in the Mid East  
18 just Israel. Due to the politics, you either  
19 worked with the Israelis or you worked with the  
20 others, but you didn't work with both. So the U.S.  
21 was responsible just for Israel. And then in  
22 addition to Japan, in Asia we had the

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1 responsibility for the Philippines, for  
2 Singapore -- of course at that time Hong Kong was a  
3 British colony -- Hong Kong, Malaysia, and I think  
4 I've -- oh, and Australia, of course, the  
5 Australia/New Zealand territory.

6 Q Okay. And at that time when you were  
7 first employed by Software AG North America, did  
8 you learn that Software AG North America had given  
9 or assigned exclusive distributorships to other  
10 companies with respect to certain segments of its  
11 territory?

12 A When I first came to Software AG as an  
13 employee, which would have been after New Year's in  
14 '92, yes, I did quickly learn that they had  
15 distributorships with distributors in the -- in  
16 various portions of their territory other than the  
17 United States, yes.

18 Q And did you learn at that point the name  
19 of the company that was the exclusive distributor  
20 for a certain segment of the territory in South  
21 America?

22 A Well, there was more than one distributor  
page 18

1 in South America.

2 Q Okay. Which ones do you know or can you  
3 recall sitting here today?

4 A I was on a very good basis with the  
5 distributor in Venezuela, which was a territory  
6 unto itself. And then, of course, Consist, the  
7 plaintiff in this action, had a -- at the time I  
8 joined Software AG they had six countries that they  
9 were responsible for, the biggest being Brazil and  
10 Argentina, and they had Uruguay, Paraguay, Chile  
11 and I think they had Peru. I -- ten years I'm  
12 remembering there.

13 Q You're correct, eventually it did include  
14 Peru but it --

15 A I think that was --

16 Q -- was Bolivia.

17 A Bolivia. I'm sorry.

[18:21] - [24:14]

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18 Q Okay. So the six would have been --

19 A Without --

20 Q -- without --

21 A -- Peru and then Peru was later added as

22 a seventh I remember, yes.

page 19

1 Q Now, do you remember whether the company  
2 that held the distributorship was, in fact, called  
3 Consist at that point or did it have a different  
4 name?

5 A It -- it might have been working under a  
6 different name. At one time it functioned under  
7 the name PACS, P-A-C-S, which I believe, if I  
8 recollect correctly from ten years ago, was a New  
9 York entity, but I -- I for most of my career heard  
10 it described as -- as PACS. But in legal documents  
11 its name may have been...

12 Q Well, if I told you that the company's  
13 name was Pan American Computer Systems, Inc., would  
14 that refresh your recollection?

15 A That would be PACS, P-A-C-S.

16 Q That would be PACS, correct.

17 A Right.

18 Q And did you learn at that point or at any  
19 point thereafter how long PACS had been the  
20 exclusive distributorship for Software AG products  
21 in the countries that you just named in South  
22 America?

page 20

1 A I knew of their existence as the  
2 distributor certainly for the time that I was at  
3 Software AG and I later learned that they had been  
4 the distributor -- the only distributor that had  
5 ever been in that territory and that they went back  
6 very far with Software AG as distributor in that  
7 territory, they were the original distributor and  
8 they had been continuously the distributor for  
9 Software AG in that territory, that it went back  
10 very far.

11 Q Did you ever hear that it went back to  
12 1975?

13 A I -- I might have heard that. I'm not a  
14 hundred percent sure.

15 Q But that's not a date that would surprise  
16 you?

17 A No, no, it would not surprise me.

18 Q Okay. And did you also know that PACS  
19 was the exclusive distributor for Software AG  
20 products in its territory?

21 A Oh, I certainly knew that, right.

22 Q Okay.

page 21

1 A That was a very important element of the  
2 relationship.

3 Q Now, you were telling us about your  
4 career and you got up to being on an hourly basis  
5 with Software AG North America.

6 Why don't you tell us what next happened  
7 in your career.

8 A Okay. Around the holidays of '91,  
9 Christmas, I was working at Software AG and we had  
10 one of our, or they had one of their executive  
11 meetings. And I was making a presentation on  
12 several deals and one of the people made a  
13 suggestion that I be brought on permanently, they  
14 needed someone in that position, and sort of a job  
15 offer occurred in realtime while I was making a  
16 presentation to the executives at Software AG and  
17 Mr. King later made it official. And I had a great  
18 deal of admiration for Mr. King and respect for  
19 Mr. King and -- and couldn't have asked for a  
20 better person to be my boss. So that was a big  
21 factor in accepting. It was the kind of work that  
22 I -- I did. And what I had learned so far about

page 22

1 the company I liked, and the people, so there was  
 2 no reason -- it was a great, fortuitous  
 3 opportunity, so I -- I jumped on it.

4 Q And you said that was around the holidays  
 5 of 1991?

6 A The end of the year '91.

7 Q Okay.

8 A So I started in '92 as an employee.

9 Q And your title at that point was what?

10 A Again, it was, you know, attorney or  
 11 general attorney and then it became, within a year  
 12 or so, general counsel and then vice-president and  
 13 general counsel.

14 Q When you were the general attorney, were  
 15 you functioning alone or were you in an office?

16 A Alone, but in an office.

17 Q Okay. You had no subordinates or  
 18 associates to do other work for you?

19 A Not --

20 Q No lawyers?

21 A No lawyers. I -- I just had one admin  
 22 and -- myself and the admin.

page 23

1 Now, at that time Software AG had a  
 2 contracts department that worked quite actively on  
 3 negotiating the standard preprinted form contracts.  
 4 So the legal department at that time didn't do as  
 5 much of the face-to-face with customer contract  
 6 negotiations, it was handling mainly the legal  
 7 issues, and the contracts department in  
 8 consultation with the businesspeople would "close  
 9 the deal" as far as getting a form contract either  
 10 signed or modified and signed.

11 Q Now, do you recall having negotiated and  
 12 drafted nonstandard form contracts?

13 A Oh, yes. That's mostly -- was mostly  
 14 what I would do. I would say it would be -- about  
 15 two-thirds to three-quarters of my work would be  
 16 the drafting, negotiation, modification, and  
 17 finally approval for execution of nonstandard  
 18 contracts.

19 The rule at Software AG was standard  
 20 preprinted contracts unmodified could be signed and  
 21 accepted by any salesmen or, you know,  
 22 representative of the company.

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1 Q And do you recall having reviewed the  
 2 standard form contracts at any point in your  
 3 career?

4 A Oh, yes, it was a continual process of,  
 5 you know, review, update and, you know,  
 6 modification if necessary.

7 If a customer suggested some language in  
 8 a negotiation which we thought was particularly  
 9 good for the market and the marketplace, and the  
 10 salespeople agreed it was good for the market and  
 11 the marketplace, we would revise, when necessary,  
 12 the standard form contracts to take into account  
 13 such, you know, customer-friendly or  
 14 customer-acceptable changes.

15 Q Now, you told us before that when you  
 16 first came on board, Software AG of North America  
 17 was an independent company.

[28:6] - [28:11]

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6 Q Can you fix a date, Mr. Daly, on when you  
 7 received the title general counsel of Software AG  
 8 North America?

9 A The exact date would be in the corporate

10 minutes. I don't know. Any -- any date I gave at  
11 this point in time would be a guess.

[28:17] - [29:1]

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17 Q And maybe you can tell us when you  
18 stopped working for Software AG.

19 A In April of '98.

20 Q Okay. So from the time that you were  
21 named as general counsel until you left you  
22 consistently held the position of general counsel

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1 of Software AG North America; is that correct?

2 A Yes, I did.

[33:20] - [34:8]

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20 Q Now, Mr. Daly, were you the primary  
21 person responsible for drafting and negotiating the  
22 stand-alone contracts, and by that I mean nonform

page 34

1 contracts, throughout your tenure?

2 A I would say yes, I had the -- I had the  
3 full responsibility for them. I frequently got  
4 help from either Bob or Karl.

5 Q But you were ultimately responsible for

6 --  
7 A Yes, I ultimately reviewed the final work  
8 product before it went out.

[37:1] - [38:5]

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1 Q Can you just give us an estimate of how  
2 many contracts you've drafted over your career?

3 A Oh, my goodness. Starting with Martin  
4 Marietta?

5 Q Yeah.

6 A Let's see. It's hundreds. I would say  
7 it's easily 500.

8 Q Okay. That you personally drafted or at  
9 least had primary responsibility?

10 A My fingerprints are on them and I had the  
11 ultimate responsibility in most cases for the  
12 contents.

13 Q Before I asked you about dealings with  
14 Natalio Fridman and then you started to answer.

15 Could you tell us the first time you recall  
16 anything having to do with Natalio Fridman?

17 A Well, as we mentioned earlier, for the  
18 entire time I was there Natalio was Software AG's  
19 exclusive distributor in the countries we  
20 identified. We associate him primarily with  
21 Brazil, but it was true he had the rest of the  
22 territory. And so I'm sure early in my first year

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1 I was made aware by the then VP of international  
2 operations, a man named Phillipe Kuperman, of  
3 Natalio and his relationship with Software AG of  
4 North America, and I was certainly given a copy of  
5 his Distributorship Agreement.

[39:12] - [39:21]

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12 Q Okay. Did Mr. Kuperman negotiate any of  
13 the contracts with Mr. Fridman, as far as you know?

14 A Yes, he did.

15 Q Which ones can you recall now are the  
16 ones that Mr. Kuperman negotiated?  
17 A To the best of my knowledge, Kuperman and  
18 King negotiated the terms of the contracts prior to  
19 the one that I worked on in -- prior to the '98 one  
20 that's, I understand, to be the subject of the  
21 litigation.

[41:2] - [42:8]

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2 Q Okay. Fine.  
3 Are you aware of any problems that  
4 Software AG of North America had with Natalio  
5 Fridman in 1992?  
6 A Specific -- I know of the problem --  
7 problems we had with Natalio from the very  
8 beginning until the end. They -- the problems were  
9 the same.  
10 Q And what were those problems?  
11 A Okay. He did not want to enter into a  
12 standard Distribution Agreement similar to the ones  
13 which we used with all of our other distributors.  
14 He refused to accept some of the terms of our  
15 standard, if you can call it such, a standard  
16 Distribution Agreement. Obviously they were  
17 individually negotiated.  
18 Q And what were some of the provisions that  
19 Mr. Fridman refused to accept in the standard  
20 Distribution Agreement?  
21 A Well, his two primary complaints were,  
22 one, he did not want to report the names and

page 42

1 addresses and other information related to the  
2 licensees in his territory, his customers. He did  
3 not want us to have that. And, number two, he was  
4 always very concerned that at the end of one of  
5 these three-year cycles, or even in the middle of  
6 one of them, that Software AG would terminate his  
7 distributorship and then effectively, you know,  
8 close down his business.

[80:6] - [80:9]

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6 Q Did you ever hear in words or substance  
7 anyone say that Natalio was making too much money  
8 in the territory?  
9 A It's -- it's long again. I'm sorry.

[80:17] - [80:18]

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14 question did you ever hear anyone say --  
15 THE WITNESS: Yes, there was.  
16 BY MR. SCHAFFER:  
17 Q And what did you hear and from whom did  
18 you hear it?  
19 MR. BASINGER: And there I would just  
20 caution you, to the extent you're revealing  
21 attorney/client information, don't do that.

[81:3] - [81:8]

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22 MR. SCHAFFER: That's a standing

page 81

1 instruction.  
2 MR. BASINGER: Right.  
3 THE WITNESS: Okay. The part that's not



4 privileged, there were discussions not privileged  
 5 about whether Natalio and Software AG had a fair  
 6 agreement, which in your words means were we  
 7 receiving adequate compensation for our product in  
 8 the territory. Yes, those conversations occurred.  
 9 BY MR. SCHAFFER:  
 10 Q And what can you report about those  
 11 conversations in detail?

[82:15] - [82:20]

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page 82  
 15 Q But let me understand the business view  
 16 that you expressed. You expressed to Software AG  
 17 that Software AG was going to incur a high expense  
 18 to go into the territories that PACS --  
 19 A Those six which later became seven  
 20 countries, yes.

[82:22] - [83:3]

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page 82  
 19 A Those six which later became seven  
 20 countries, yes.  
 21 Q Okay.  
 22 MR. BASINGER: And just object as vague,  
 page 83  
 1 and the comment on that is do we need to make a  
 2 distinction between Software AG and SAGNA or  
 3 whatever the North American name is?  
 4 BY MR. SCHAFFER:  
 5 Q Is there a distinction with respect to  
 6 this between SAGNA and SAG?

[83:5] - [84:4]

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page 83  
 5 Q Is there a distinction with respect to  
 6 this between SAGNA and SAG?  
 7 A I can answer that without giving away any  
 8 privileged information. Software AG Germany looked  
 9 upon it as our problem. They would just  
 10 essentially mock us for letting Natalio get away  
 11 with something. In other words, North America,  
 12 we've given you the territory. That piece you  
 13 should be getting a hell of a lot more out of than  
 14 you are getting. So it was a business criticism.  
 15 Q Okay.  
 16 A Okay. Natalio's ripping you off.  
 17 Q Okay. Do you know who at Software AG in  
 18 Germany expressed that view?  
 19 A Who did I hear express it?  
 20 Q Yes.  
 21 A I -- I hate to give out names. I mean it  
 22 was my legal superior, his name was  
 page 84  
 1 Dr. Strickstock, and I heard Peter Schnell say it  
 2 in conversation to Mike King.  
 3 Q And can you put a general date on when  
 4 you heard that?  
 5 A I can't recall an exact date. We're ten  
 6 years or -- 1995, we're 12 years from it.

[84:8] - [84:9]

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page 84  
 7 Q I understand.  
 8 A What I can remember is that it occurred  
 9 at the time of contract renewal or renegotiation.



[84:15] - [85:14]

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15 Q Okay. Now, you saw in Defendant's  
 16 Exhibit 4 that in paragraph one there was an  
 17 obligation that in the third year of this  
 18 agreement, 1997, the parties agreed to negotiate in  
 19 good faith a new agreement. Did that ever occur?  
 20 A Oh, yes. I mean I think there's an  
 21 exchange of letters between me and Natalio in 1997  
 22 negotiating a follow-on agreement.

page 85

1 Q Okay. And in 1997, when a new agreement  
 2 was being negotiated, you were the individual who  
 3 was in charge of those negotiations?  
 4 A By that time I was wearing both hats.  
 5 Q So you were general counsel and --  
 6 A Vice-president of international --  
 7 Q -- vice-president?  
 8 A -- operations.  
 9 Q And you performed both functions in  
 10 negotiating a new agreement with --  
 11 A Right, with the understanding, of course,  
 12 that on something that big I would never conclude  
 13 it without a discussion with Mike King or -- or Dan  
 14 Gillis, whoever was then president.

[88:10] - [88:15]

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8 Q Mid '97 meaning June, July, somewhere in  
 9 that --  
 10 A May. April, May might be the earliest.  
 11 Q Do you recall actually having written a  
 12 letter that says we need to begin negotiating?  
 13 A I believe so, yeah.  
 14 Q Okay. With whom did you negotiate?  
 15 A I always dealt directly with Natalio.

[90:17] - [91:7]

11/13/2007 James Daly

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17 Q We're going to tentatively call this Daly  
 18 Exhibit 1 and I'm going to ask you whether you've  
 19 seen this document before.  
 20 A Oh, yeah, I'm sure I saw it right before  
 21 I signed it.  
 22 Q And that's your signature on page --

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1 A It is.  
 2 Q -- 3788? And this is a document which  
 3 bears identification numbers SAG 3788 through 3792,  
 4 and, Mr. Daly, can you tell us what this document  
 5 is?  
 6 A Well, as it says in the first sentence,  
 7 it's our proposal of August 4th, 1997 for a new  
 8 Distributorship Agreement with Consist and --  
 9 without reading it verbatim, but as it says, it was  
 10 the culmination of a series of meetings which had  
 11 occurred in New York where PACS maintained an  
 12 office, and talks about some of the issues that we  
 13 were -- we had on the table --

[91:12] - [91:14]

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2 Q -- 3788? And this is a document which  
 3 bears identification numbers SAG 3788 through 3792,  
 4 and, Mr. Daly, can you tell us what this document  
 5 is?  
 6 A Well, as it says in the first sentence,

7 it's our proposal of August 4th, 1997 for a new  
 8 Distributorship Agreement with Consist and --  
 9 without reading it verbatim, but as it says, it was  
 10 the culmination of a series of meetings which had  
 11 occurred in New York where PACS maintained an  
 12 office, and talks about some of the issues that we  
 13 were -- we had on the table --  
 14 Q Okay.  
 15 A -- to wrap up the agreement.

[92:21] - [93:18]

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21 Q Can you tell us, Mr. Daly, what the  
 22 primary points of the negotiation were that you had

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1 with Mr. Fridman in the time period leading up to  
 2 the August 4th letter?

3 A Okay. Yes, I can.

4 Q Please tell us what you can recall about  
 5 it.

6 A The two key issues are -- contained the  
 7 two that were important towards the conclusion of  
 8 the agreement. We -- there is another letter that  
 9 talks about the term of the agreement. That was a  
 10 major issue, so I should correct myself and say  
 11 there were at least three; the term of the  
 12 agreement, which is contained in another letter,  
 13 and the two issues here, one of which was  
 14 significant and the other are minor details.

15 We were always suspicious of Natalio's  
 16 utilization of tax receipts because he was so close  
 17 to the government authorities in Brazil, and I -- I  
 18 think they were one of his biggest customers.

[95:14] - [96:17]

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14 Q And you said before that you recalled a  
 15 letter that spoke about the term of the agreement.  
 16 What was the issue with respect to the  
 17 term of the agreement?

18 A To the best of my recollection now 11  
 19 years later or ten years later, Natalio was asking  
 20 for an agreement that went on forever. He wanted a  
 21 perpetual agreement. He wanted to stop the three,  
 22 three, three, three, three and having to come back

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1 and having to renegotiate with people like me. And  
 2 we took his request -- I took his request for 25  
 3 back, and I -- I have to respect Natalio, so if he  
 4 made a request, even if I thought it was  
 5 ridiculous, I would take it back, okay, to the  
 6 powers that be and -- well, got the obvious result.  
 7 So I went back to him and said, you know, the most  
 8 we can do is -- the best we can do is chop the 25  
 9 up.

10 Q So is it your recollection that  
 11 Mr. Fridman wanted a perpetual agreement or --

12 A Yes.

13 Q -- a 25-year term?

14 A Well, he talked professional (sic) first.

15 Q Perpetual?

16 A Right. When that was laughed at, he said  
 17 well, 25.

[97:22] - [100:16]

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22 Q So please tell us about the second point.

page 98

1 A And the second one starts there on the  
 2 third line with the "Also in line with our  
 3 discussion in New York." There had been a  
 4 perennial complaint by Natalio that he was doing  
 5 the better job selling in his territory than the  
 6 Americans were in theirs. So in addition to  
 7 getting a longer term agreement, he wanted to do  
 8 something about the automatic escalation clause.  
 9 The original proposal was so much per  
 10 year and then the second year it goes up by this  
 11 percent, goes up by this percent, goes up by this  
 12 percent. And he said well, you're not doing as  
 13 well in your territory as I'm doing in mine, why  
 14 should I go up and you don't have to. So after  
 15 much haggling and discussion and argument he  
 16 requested that we adjust each year his payment by  
 17 the increase in revenues in the United States -- by  
 18 the percentage increase in revenues in the United  
 19 States, essentially calling our bluff on gaining  
 20 more business in the United States, showing him  
 21 that we were effective.  
 22 Now, in our mind the argument didn't make

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1 any sense, but the management in Virginia was  
 2 willing to accept it.  
 3 Q Okay. Now --  
 4 A So you see it starting on the third line  
 5 with the "Also." "We have proposed an annual  
 6 increment or decrement based on the increase or  
 7 decrease in SAGA's," that's North America's,  
 8 "product revenue."  
 9 Q Okay.  
 10 A And then Peru pops up, which is another  
 11 minor point.  
 12 Q And why is Peru being added to this  
 13 agreement?  
 14 A There had been a distributor in Peru who  
 15 was not Natalio, and that distributor had basically  
 16 done nothing with the territory, not built up a  
 17 staff, not built up a sales base or a customer  
 18 base, and just was doing nothing with the  
 19 territory, and Natalio asked for it.  
 20 Q So you recall that Natalio asked for Peru  
 21 to be included in the territory?  
 22 A To be added, yes.

page 100

1 Q Okay.  
 2 A And we were having problems with the  
 3 existing distributor, so we didn't have a -- too  
 4 much of an issue with it -- with adding it to his  
 5 territory because he made his usual promise to, you  
 6 know, serve it and take care of it and grow it.  
 7 Q Do you know why the existing distributor  
 8 at the time did not succeed in Peru?  
 9 A I think it was just a lack of diligent  
 10 effort on his part, investment and effort. These  
 11 distributorships take a substantial investment  
 12 because you have to hire highly-skilled people and  
 13 the equipment that this software runs on is not  
 14 cheap. It's mainframe computer equipment usually.  
 15 So the hardware is expensive and the people who  
 16 know how to work with it are very expensive.

[104:1] - [104:18]

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page 103

21 Q And the term there is listed as 1/1/98  
 22 through 12/31/22, which is 25 years?

page 104

1 A That's the -- that's the 25-year  
 2 out-of-the-starting-blocks number.

3 Q And this was something that Software AG  
4 North America was willing to offer Natalio?  
5 A No, this was Natalio's request  
6 regurgitated to Software AG.  
7 Q Well, on page 3788 of Daly Exhibit 1 the  
8 first sentence says, "Attached is our proposal for  
9 the new Consist Distributor Agreement."  
10 A Right.  
11 Q So isn't the proposal that's stated in II  
12 your proposal to Natalio?  
13 A Well, it's repeating back to him his --  
14 his request, so, yes, at that particular point we  
15 had this August letter, right, offered that.  
16 Q So Software AG North America was offering  
17 to Natalio a 25-year term?  
18 A Uh-huh, at that point in time yes.

[106:14] - [106:22]

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page 106

14 Q Okay. Take a look at page 3790, if you  
15 would.  
16 A Okay.  
17 Q And look, if you would, at number four.  
18 A Right.  
19 Q That says, "At the end of the first five  
20 years of this agreement either party can terminate  
21 this agreement with 18 months' notice."  
22 A Right.

[107:1] - [109:21]

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page 107

1 Q What does that mean?  
2 A It means that at the three and-a-half  
3 year point either party, if they don't want to  
4 continue, can notify the other that they're going  
5 to terminate the agreement at the end of the  
6 five-year term.  
7 Q Does it require any cause to terminate?  
8 A No, just notice saying I don't want to go  
9 on anymore.  
10 Q And that is the right that was available  
11 within the first five-year segment; is that  
12 correct?  
13 A In this document here, yes.  
14 Q Okay. And do you recall what  
15 Mr. Fridman's reaction to SAGA -- I think at this  
16 point we actually changed the name from Software AG  
17 North America to SAGA; is that right?  
18 A Right.  
19 Q So I'll refer to it now as SAGA.  
20 A Sure.  
21 Q Is that okay?  
22 A Sure.

page 108

1 Q What was Mr. Fridman's reaction to SAGA's  
2 proposal, as reflected in Exhibit 29?  
3 A Well, I mean his -- his reaction was  
4 pretty strong.  
5 Q And what did he say to you and what did  
6 you say to him?  
7 A He didn't want it. He wanted it taken  
8 out. He said I don't want there to be any  
9 termination right until the end of the 25 years, so  
10 it will be over in 25 years. And we said we can't  
11 live with that. We need this type of check and  
12 balance in the -- in the contract that if for any  
13 reason, not necessarily a material breach, we want  
14 to terminate at the end of any five-year period,  
15 we'll give you 18 months; notice so you have plenty

16 of time to wrap up your customers and your affairs  
 17 with your customers and then we'll take over at the  
 18 end of the five-year period. This is pretty  
 19 standard in the industry.

20 Q Okay.

21 A And he said well, five years, Natalio, a  
 22 little bit of flamboyance thrown in there, and he  
 page 109

1 said he couldn't live with it. And that's why  
 2 after discussion and negotiation you wind up with  
 3 the final result that was signed.

4 Q Okay. Do you recall, by the way, at this  
 5 point, meaning in 1997, how long a company that was  
 6 affiliated with Natalio had been the exclusive  
 7 distributor of Software AG products in the  
 8 territory?

9 A What year are we in here?

10 Q We're 1997 at this point.

11 A 1997. He would have started right after  
 12 the company was -- I would subtract 75 from 97 and  
 13 say 22.

14 Q So your best recollection --

15 A That's my -- that's my best estimate.

16 Now, I don't know if he started in '75 or '76.

17 There might be a little --

18 Q In any event, that's --

19 A -- movement in the joints there.

20 Q Okay. Over 20 years? Let's put it that  
 21 way.

22 A Yes.

[112:8] - [113:1]

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page 112

8 Q Okay. To your knowledge Mr. Fridman is  
 9 not a lawyer, is he?

10 A No, he's not.

11 Q Okay.

12 A He's not.

13 Q And to your best recollection he was the  
 14 only one who was negotiating this agreement with  
 15 you; is that correct?

16 A He was the only one at the meeting, so I  
 17 don't know who he consulted for advice.

18 Q Okay. But he certainly in face-to-face  
 19 discussions with you and the discussions on the  
 20 telephone, as best you knew, he was the only one  
 21 who was doing the negotiations on behalf of  
 22 Consist; is that correct?

page 113

1 A Yes.

[113:9] - [114:4]

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page 113

9 Q Mr. Daly, Exhibit 30 is a document which  
 10 bears Bates stamp numbers CSS-53 through 65, and I  
 11 ask you whether you have ever seen this before.

12 A Yes, I -- I have. That's my signature on  
 13 0055.

14 Q And tell us what this document is.

15 A Well, the -- we had just looked at the  
 16 letter on August 4th --

17 Q And that was Exhibit 29?

18 A Right -- which, as it's indicated in the  
 19 first sentence, was a reaction to the last meeting  
 20 in New York.

21 We then had further discussions on the,  
 22 basically the attachment to Exhibit 29 as well as

page 114

1 the contents of the cover letter and we then --

2 that resulted in my next letter to Natalio, which I  
 3 believe was this August 21st, '97 letter, which is  
 4 CSS-54.

[118:21] - [122:2]

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page 118

21 Q At the point that you were negotiating  
 22 this agreement with Mr. Fridman you were at that

page 119

1 point the vice-president in charge of international  
 2 operations; is that correct?

3 A I believe so. I believe I still was,  
 4 yes.

5 Q Can you tell me succinctly or in whatever  
 6 length you need to tell me how one goes about  
 7 marketing a special product in general? Well, let  
 8 me withdraw that question and ask a different one.

9 Can you tell me, as the vice-president of  
 10 international operations, what Mr. Fridman's  
 11 company would need to market and sell a special  
 12 product?

13 MR. BASINGER: Object to the form. You  
 14 may answer to the extent you're able.

15 THE WITNESS: They -- well, the first  
 16 thing they would need is training on the product;  
 17 what does the product do, how does it do it, and  
 18 why would anyone want to buy it.

19 BY MR. SCHAFFER:

20 Q Okay.

21 A Okay? Which we provided.

22 Q Okay.

page 120

1 A There was a gentlemen who worked for me,  
 2 David Riddick, he and a couple of assistants that  
 3 he had would go down there and conduct a training  
 4 program on these third-party products sometimes  
 5 with, sometimes without the true authors of the  
 6 third product to help them out. In addition, they  
 7 would need demonstration and installation copies of  
 8 the products as well as literature.

9 Now, it wasn't that simple unless they  
 10 were going to use the products in English. In  
 11 these particular cases these three products would  
 12 be used as they came out of the box in English.

13 Sometimes products and the documentation  
 14 that went along with them have to be what we call  
 15 localized, that is, put into the language of the  
 16 country, which in the case of Brazil is Portuguese,  
 17 and then, as you know, in Latin America there are  
 18 variants on Spanish that are used in the various  
 19 countries, and for sales and marketing purposes  
 20 they have to use the proper variant. So there was  
 21 some work to do. The most egregious example, of  
 22 course, is the Japanese where they have to convert

page 121

1 all of the external displays and documentation into  
 2 the native language.

3 So he would attend the training classes,  
 4 get the demonstration and installation products, do  
 5 whatever localization he felt was necessary to both  
 6 the documentation and the products, and then hold a  
 7 sales seminar for his salespeople to explain to  
 8 them who the target audience was, what the pricing  
 9 was, and how to sell it.

10 Q Okay. And simply having a price list  
 11 itself would not in any way assist in the sale or  
 12 marketing of special products; is that correct?

13 MR. BASINGER: Object to the form. You  
 14 may answer.

15 THE WITNESS: Sometimes if he was very



16 familiar with the product, it was just a new  
17 version or a new variant of an existing product, he  
18 didn't need any training. All he needed was the  
19 price list. In rare cases that occurred.

20 BY MR. SCHAFFER:

21 Q But in the usual case he would require  
22 training user manuals, demonstration copies and  
page 122

1 sales copies; is that right?

2 A Right.

[123:9] - [123:12]

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page 123

9 Q Okay. Finally, point six says that SAGA  
10 is ready to execute the deal and if you give me  
11 your approval, I will send you a signed copy?

12 A Right.

[124:15] - [124:18]

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page 124

12 Q Okay.

13 A And then he and I would -- would talk if  
14 it got too legalese.

15 Q Okay. Let's turn to the draft agreement  
16 that's behind Exhibit 30, and can you show me in  
17 this draft agreement where it is that you are  
18 presenting a non-cancelable ten-year contract?

19 MR. BASINGER: Object to the form. You  
20 may answer.

21 BY MR. SCHAFFER:

[124:22] - [126:22]

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page 124

22 Q That is --

page 125

1 A Let me see here. Okay. I would -- I see  
2 it immediately in paragraph one.

3 Q And can you read the language that --

4 A Sure.

5 Q -- refers to a ten-year non-cancelable  
6 contract?

7 A Okay. "SAGA appoints PACS the exclusive  
8 distributor of the systems in the territory," and  
9 systems and territory are all caps, "for the period  
10 of January 1, '98 through December 31, 2007." I  
11 believe that's ten years. "During the last year of  
12 this term (2007) the parties agree to negotiate in  
13 good faith a new agreement." So normally that's a  
14 signal to me that the prior agreement has ended if  
15 they're going to begin negotiating a new agreement.  
16 You wouldn't negotiate if you were, you know,  
17 continuing uninterrupted. "The parties understand  
18 and agree that at the end of the first ten-year  
19 period of this agreement, this agreement shall  
20 automatically renew for successive five-year  
21 periods" -- so that's an initial ten with follow-on  
22 fives. And there's the lawyer's favorite term,

page 126

1 "Unless either party shall decide to terminate this  
2 agreement upon the giving of 18 months' prior  
3 written notice to the other party."

4 Q Okay.

5 A So I read that last lengthy sentence to  
6 say that the agreement is not cancelable for the  
7 first ten years, so you've got ten years for sure.  
8 It will be renewed for successive five-year periods  
9 unless terminated by one of the parties giving 18  
10 months' prior written notice to the other party.



11 So there are points, eight and-a-half years and  
 12 then after that every three and-a-half years, where  
 13 either party by notice to the other can say without  
 14 cause, without breach, without anything, for  
 15 whatever reason I don't want to go on anymore.  
 16 Q Okay.  
 17 A So-called, you know, termination without  
 18 cause.  
 19 Q Okay.  
 20 A If it's not given, then there's --  
 21 another five-year period would start after the  
 22 initial ten-year period.

[143:11] - [143:21]

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page 143

11 Q Okay. Now, is the 18-month notice that  
 12 is available under paragraph one of the proposed  
 13 Distributorship Agreement that's annexed to  
 14 Exhibit 30 the only way in which the parties to  
 15 this agreement can terminate it?  
 16 MR. BASINGER: Object to the form. You  
 17 may answer.  
 18 THE WITNESS: Okay. There -- the answer  
 19 is paragraph one is the termination without cause  
 20 provision. Paragraph, I believe it's seven, is a  
 21 second method different from paragraph one.  
 22 BY MR. SCHAFFER:

page 144

1 Q And could you read paragraph seven into  
 2 the record, please.  
 3 A Okay.

[144:7] - [145:21]

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page 144

7 Q Okay. Would you read paragraph eight of  
 8 the proposed Distributorship Agreement annexed to  
 9 Exhibit 30 into the record?  
 10 A Okay. "SAGA reserves the right to  
 11 terminate this agreement should PACS fail to  
 12 perform any material conditions of this agreement.  
 13 "Before such termination shall become  
 14 effective, SAGA shall give written notice to PACS  
 15 describing in detail what material conditions PACS  
 16 has failed to perform, and PACS shall have 60 days  
 17 in which to perform such conditions."  
 18 Q Now, can you explain for us what that  
 19 paragraph, as a contract draftsman, is intended to  
 20 mean?

21 A Okay. That's the termination with cause  
 22 and includes a repair period of 60 days in which

page 145

1 the breaching party can repair the breach and avoid  
 2 the termination.

3 Q And paragraph eight is a right that's  
 4 granted only to SAGA under this proposal; is that  
 5 correct?

6 MR. BASINGER: Object to form. You can  
 7 answer.

8 THE WITNESS: Paragraph eight, yes, is --  
 9 is SAGA has reserved the right to terminate.

10 BY MR. SCHAFFER:

11 Q And so paragraph eight explicitly says in  
 12 its first sentence that "SAGA reserves the right to  
 13 terminate this agreement should PACS fail to  
 14 perform any material conditions of this agreement"

15 --

16 A Right.

17 Q -- and then provides a cure provision,  
 18 correct?

19 A Right.  
20 Q Okay.  
21 A Sixty days in which to...

[158:17] - [158:19]

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page 158

17 Q Now, you said that Mr. Fridman had  
18 acceded to the ten-year term that you described as  
19 being reflected in paragraph one.  
20 A (Nodding.)

[159:4] - [160:9]

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page 159

4 Q Well, are you saying that he did not  
5 still insist on having an evergreen contract?  
6 MR. BASINGER: Object to the form. You  
7 may answer.  
8 THE WITNESS: He -- okay. The semantics  
9 are difficult here. He may have requested and said  
10 he would still prefer, but he accepted that all he  
11 could get was what was in the agreement.  
12 BY MR. SCHAFFER:  
13 Q But I think it's important that you try  
14 to tell us exactly what he said to you with respect  
15 to --  
16 A I can't remember his exact words after 12  
17 years or 11 years.  
18 Q Well, are you saying that he gave up the  
19 notion of having a perpetual agreement?  
20 A Gave up. My only recollection is he  
21 agreed to the language which made its way into the  
22 agreement. That's all I can remember after ten

page 160

1 years. I can't remember his exact emotional  
2 response or his -- even his verbal response, but I  
3 do remember that the one that I signed and sent  
4 back to him contained the -- the language that we  
5 agreed was going to be in the final agreement.  
6 Q Okay.  
7 A But I can't remember his, you know, the  
8 verbals or the communications that led up to that.  
9 After ten years I can't, no.

[161:2] - [161:22]

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page 160

21 contract before I signed it and sent it back to him  
22 for his signature.

page 161

1 BY MR. SCHAFFER:  
2 Q But let me be very specific. You do not  
3 have any recollection that Mr. Fridman said to you  
4 that he was either giving up a perpetual agreement  
5 or was acceding to the notion that you had a right  
6 to terminate the contract after ten years for any  
7 reason that you wanted or that he had the right to  
8 terminate the contract after ten years for any  
9 reason that he wanted?  
10 A I -- the only thing I can recollect is  
11 reading paragraph one to him, telling him that's  
12 what I'm going to send him, I will sign it.  
13 It's -- it's what Software AG can do.  
14 Q Okay. Did you --  
15 A If you want to, you know, look it over,  
16 or discuss it or anything, you know, I always left  
17 the door open for Natalio to call me and talk.  
18 Q Did you read paragraph seven to him?  
19 A Yes, I'm sure I did because paragraph  
20 seven I think changed.

21 MR. BASINGER: Object to the form of the  
22 question by the way.

page 162

1 THE WITNESS: I did. Well, it wouldn't  
2 have been seven, it would have been eight I think.  
3 I think we had seven twice in the agreement there.

[162:19] - [164:11]

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19 Q And when you say that Mr. Fridman acceded  
20 to the version of the contract that you read to  
21 him, were you referring to the one that he  
22 ultimately signed or are you referring to

page 163

1 Exhibit 30?

2 A No. I would have -- I would have --  
3 before I would have sent him a signed contract,  
4 having dealt with him as much as I had, I knew that  
5 unless he knew everything that was in that contract  
6 I was wasting bits on the fax machine, paper and  
7 ink sending him anything. So I talked to him about  
8 it, all the changes that were made between the last  
9 one he had seen and the one I was sending him, and  
10 I probably told him that I had gotten the most I  
11 could out of the top management in Germany and the  
12 U.S. --

13 Q Okay.

14 A -- and this was the deal that SAGNA was  
15 willing -- ready, willing and able to sign and  
16 here's a signed copy.

17 Q I'm going to ask the reporter to mark  
18 this document as Exhibit 31.

19 (Daly Exhibit Number 31 was  
20 marked for identification.)

21 BY MR. SCHAFFER:

22 Q Have you ever seen Exhibit 31 before,

page 164

1 Mr. Daly?

2 A Yes, I must have. That's my signature --

3 Q Okay.

4 A -- at the bottom of the cover letter.

5 Q And you signed as vice-president,  
6 international operations; is that correct?

7 A Which I was at that time.

8 Q And you were also still the general  
9 counsel at that time, correct?

10 A I was the general counsel for the whole  
11 time I was there.

[165:13] - [166:10]

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page 165

13 Q Mr. Daly, are you the draftsman of the  
14 agreement that's annexed to the letter that is  
15 Exhibit 31?

16 A Yeah, I have to take credit for creating  
17 the final version.

18 Q And is it about this agreement that, or  
19 this proposed agreement that you testified to  
20 earlier that you read to Natalio Fridman and that  
21 he said that he acceded to its terms?

22 A Yeah, and when I say I read it to him,

page 166

1 I -- I might have faxed it to him, okay, for him to  
2 see it and -- on paper. Okay?

3 Q Okay.

4 A The fax machine was going back and forth  
5 quite frequently on -- on things so that he  
6 wouldn't -- I wouldn't have to, you know, he  
7 wouldn't have to take down dictation. When I read

8 him clauses in a contract, I would send it to him  
 9 and he would look it over. But by the time it went  
 10 up to him for signature that would have happened.

[167:8] - [167:22]

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page 167

8 Q Okay. And then you close your letter by  
 9 saying, "Thank you again and SAGA looks forward to  
 10 a continuing, successful relationship with Consist.  
 11 Best regards," and then there's your signature.

12 Now, take a look, if you would, at  
 13 Exhibit 31's Distributorship Agreement. This is  
 14 the one that you signed?

15 A Uh-huh.

16 Q And one of the things that we see  
 17 immediately is that PACS, Pan American Computer  
 18 Systems, is changed to Consist International. Do  
 19 you see that?

20 A That would have been at his request.

21 Q That would have been at his request.

22 And SAGA is described as the exclusive

page 168

1 distributor of certain software packages in the  
 2 territory.

3 A Yes.

[168:8] - [169:8]

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page 168

8 Q -- or you were appointing Consist to be  
 9 the exclusive distributor of the systems in the  
 10 territory?

11 Now, paragraph one in the agreement that  
 12 is annexed to Exhibit 31 has a difference from the  
 13 agreement that we saw annexed to Exhibit 30.

14 A Right.

15 Q And do you see that the sentence that we  
 16 had spoken about before that said "During the last  
 17 year of this term (2007) the parties agree to  
 18 negotiate in good faith a new agreement," and that  
 19 sentence has been taken out of this version. Do  
 20 you see that?

21 A Uh-huh.

22 Q Do you know why that was?

page 169

1 A Immediately the only comment I would  
 2 have -- I would have is I don't recall the specific  
 3 reason it was removed, but it must have been as a  
 4 result of either a request from Software AG or from  
 5 Consist.

6 Q But you don't remember which one?

7 A I don't remember which one, no. I can't  
 8 recall which one.

[169:22] - [170:16]

11/13/2007 James Daly

page 169

22 Q Take a look at that subparagraph and

page 170

1 compare it to the version that's reflected in  
 2 Exhibit 30.

3 A Okay. Right. Yes, I understand that.

4 Q And do you see what the difference is  
 5 between those two?

6 A The difference is the reporting only on  
 7 special products on the annex versus all products  
 8 installed in the territory, and I'm sure, from the  
 9 nature of it, that it came from Natalio.

10 Q And you say that it came from Natalio  
 11 because of the nature of it?

12 A Right.  
 13 Q Why do you conclude that?  
 14 A Because of his general allergic reaction  
 15 to any request for reports, details of the  
 16 installations within his territory.

[171:13] - [172:5]

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page 171

13 Q Okay. Did you ever hear Natalio say that  
 14 the reason he didn't want to report customers to  
 15 Software AG was because he was afraid that Software  
 16 AG would then try to take customers away in words  
 17 or substance?

18 A I believe that thought was expressed to  
 19 me, yes. When I -- when I would push him on why he  
 20 didn't want to report, I believe at -- at some  
 21 particular point in time I heard him misstate that,  
 22 and I told him that that was, you know, ridiculous

page 172

1 paranoia, yeah.

2 Q And you felt it was ridiculous paranoia  
 3 because why?

4 A Because Software AG didn't "steal"  
 5 customers from its distributors.

[174:16] - [175:21]

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page 174

13 only a small fraction of his customer base, we  
 14 weren't even receiving what we should under a  
 15 normal, plain vanilla Distributorship Agreement.

16 Q Well, was the Distributorship Agreement  
 17 that you had with Natalio at the time that you're  
 18 speaking a plain vanilla Distributorship Agreement?

19 A No.

20 MR. BASINGER: Object to the form of the  
 21 question.

22 THE WITNESS: No. To the best of my

page 175

1 knowledge we never had a, what we referred to as a  
 2 standard, which I just referred to as a plain  
 3 vanilla Distributorship Agreement with Natalio.

4 BY MR. SCHAFFER:

5 Q And, in fact, isn't it true that Software  
 6 AG North America or SAGA simply got a lump-sum  
 7 payment from Natalio and that the payments that  
 8 were due to you were not at all dependant on how  
 9 many installations he, in fact, made?

10 MR. BASINGER: Object to the form of the  
 11 question. At what time?

12 BY MR. SCHAFFER:

13 Q You can answer that question.

14 A The calculation I'm talking about was the  
 15 calculation under the standard Distributorship  
 16 Agreement versus what Natalio was paying. I  
 17 thought that was your question. If I got it wrong,  
 18 I'm sorry.

19 Q No. I'm sorry. I'm asking you while the  
 20 answer that you gave me before may have related to  
 21 or affected SAGA with respect to a standard  
 22 distributorship agreement, in fact, the number,

page 176

1 magnitude of installations that Natalio had on  
 2 behalf of PACS did not have any effect whatsoever

[176:9] - [177:13]

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page 176

6 question. If we're talking about under a specific  
 7 agreement, let's show him the agreement.

8 BY MR. SCHAFFER:  
9 Q Well, take a look at Exhibit 4.  
10 A The Defendant's 4 one, right. I mean  
11 I -- I recall that --  
12 Q And I'll --  
13 A -- I had never seen a standard  
14 Distribution Agreement between Natalio and Software  
15 AG, one which contained the standard payment  
16 language where there was a royalty paid to Software  
17 AG equal to 50 percent of the amount charged to the  
18 customer.  
19 Q So when you say that you were suspicious  
20 that Natalio had far more installations than he was  
21 reporting or that you knew about, that, in fact,  
22 had no monetary effect on SAGA whatsoever, did it?  
page 177  
1 MR. BASINGER: Object to the form of the  
2 question.  
3 THE WITNESS: No, no, its only impact was  
4 in comparing the deal we gave him versus the deal  
5 everybody else had.  
6 BY MR. SCHAFFER:  
7 Q Okay. So it's a question of he may have  
8 been making too much money because he had a better  
9 deal than other exclusive distributors; is that --  
10 A Exactly.  
11 MR. BASINGER: Object to the form of the  
12 question. Let me get that out, please.  
13 THE WITNESS: I'm sorry.  
14 MR. SCHAFFER: Excellent, Mr. Basinger.  
15 Excellent. There was nothing wrong with the form  
16 of that question and your agitation is noted.

[177:18] - [184:8]

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page 177  
15 Excellent. There was nothing wrong with the form  
16 of that question and your agitation is noted.  
17 BY MR. SCHAFFER:  
18 Q Take a look at paragraph seven of the  
19 agreement annexed to Exhibit 31.  
20 Now, that paragraph as presented is  
21 different from the paragraph eight that was  
22 contained in the proposed agreement that was  
page 178  
1 annexed to Exhibit 30, is it not?  
2 A The -- the two paragraph eights -- well,  
3 the seven in Exhibit --  
4 Q Thirty-one. I'm asking you to --  
5 A -- 31, right, compared to paragraph --  
6 Q Eight.  
7 A -- eight of 29, right, or 30?  
8 Q Of 30.  
9 A Of 30. Okay. Yes.  
10 Q Now, I'm asking you --  
11 A They are different.  
12 Q And how are they different?  
13 A Do you want me to read them?  
14 Q I do.  
15 A Okay. Paragraph eight in Exhibit 30,  
16 "SAGA reserves the right to terminate this  
17 agreement should PACS fail to perform any material  
18 condition of this agreement."  
19 Q Now, do you see that sentence in  
20 Exhibit 31?  
21 A That does not appear in paragraph seven  
22 of 31.  
page 179  
1 Q Okay. And are there any other  
2 differences between Exhibit 30 and 31?  
3 A Well, I'd have to read the second

4 paragraph.  
5 Q Please do.  
6 A "Before such termination shall become  
7 effective, SAGA shall give written notice to PACS  
8 describing in detail what material conditions PACS  
9 has failed to perform, and PACS shall have 60 days  
10 in which to perform such conditions."  
11 Q Now, you were just reading from  
12 Exhibit 30, correct?  
13 A Yes.  
14 Q Paragraph eight of Exhibit 30?  
15 A Paragraph seven of 31 says, "Before any  
16 termination of this agreement shall become  
17 effective, the terminating party shall give written  
18 notice to the other party describing in detail what  
19 material conditions the other party has failed to  
20 perform, and the other party shall have 60 days in  
21 which to perform such conditions."  
22 Q Okay. Now, why is it that the first  
page 180  
1 sentence of paragraph eight in Exhibit 30 was  
2 deleted from paragraph seven of Exhibit 31?  
3 A Well, paragraph seven of Exhibit 31  
4 applies to either party. It's -- either party  
5 could terminate under paragraph seven. There's the  
6 terminating party and the other party.  
7 Q Yes.  
8 A There is no specific designation of SAGA  
9 as the only one who can terminate in seven of 31,  
10 so there was no need for the first sentence, that  
11 SAGA reserves the right to terminate this  
12 agreement.  
13 Q Well, let me understand this correctly.  
14 You're saying that the first sentence was taken out  
15 because the first sentence simply referred to SAGA?  
16 A In paragraph eight of Number 30 the first  
17 sentence gives SAGA the right to terminate should  
18 PACS fail to perform. That's not a condition in  
19 paragraph seven of 31 --  
20 Q Okay.  
21 A -- because 31 --  
22 Q Both parties have the right to terminate?  
page 181  
1 A Under paragraph seven of 31.  
2 Q Both parties have the right to terminate?  
3 A There's a terminating party and an other  
4 party.  
5 Q Okay. Now, is there any reason why  
6 paragraph seven of Exhibit 31, to make it parallel  
7 to that thought, did not say each party reserves  
8 the right to terminate this agreement should the  
9 other party fail to perform any material conditions  
10 to this agreement?  
11 A Well, it doesn't use your exact words,  
12 but it comes very close. "The terminating party  
13 shall give notice to the other party" --  
14 Q Where does --  
15 A -- "describing in detail what material  
16 conditions the other party has failed to perform."  
17 Q Where does paragraph seven of Exhibit 31  
18 say that any party has the right to terminate on 60  
19 days' notice for material breach?  
20 MR. BASINGER: Object to the form. You  
21 may answer.  
22 THE WITNESS: It's -- if it's not stated  
page 182  
1 explicitly, it's there in the language of paragraph  
2 seven.  
3 BY MR. SCHAFFER:  
4 Q Point me to the language.  
5 A Okay. "Before any termination of this



6 agreement shall be become effective" -- "any  
 7 termination of this agreement shall become  
 8 effective, the terminating party," the one who's  
 9 choosing to terminate, "shall give written notice  
 10 to the other party," the one who's not choosing,  
 11 "describing in detail what material conditions the  
 12 other party," the nonterminating one, "has failed  
 13 to perform, and the other party shall have," the  
 14 non -- the party not asserting termination, the one  
 15 being terminated, "shall have 60 days in which to  
 16 perform such conditions." So its entire  
 17 description is implying either party can play  
 18 either role, as terminating party or as other  
 19 party.

20 Q Now, you described paragraph eight of  
 21 Exhibit 30 as being a termination for cause. Do  
 22 you remember that?

page 183

1 A Yes, uh-huh.

2 Q And paragraph eight of Exhibit 30  
 3 explicitly said that SAGA reserves the right to  
 4 terminate this agreement should PACS fail to  
 5 perform any material conditions of this agreement?

6 A Right.

7 Q Right? That's an explicit statement of  
 8 cause; is that correct?

9 A Right.

10 Q Now, is it your testimony that that  
 11 sentence was taken out simply because both parties  
 12 now had the right to terminate for material breach?

13 A Right.

14 Q And can you explain to me why it is that  
 15 you didn't change the first sentence of what was  
 16 paragraph eight in Exhibit 30 to say that either  
 17 party reserves the right to terminate this  
 18 agreement should the other party fail to perform  
 19 any material conditions of this agreement?

20 MR. BASINGER: Objection. Asked and  
 21 answered. You may answer.

22 THE WITNESS: Okay. Because I felt that

page 184

1 it was redundant giving -- given paragraph seven  
 2 because paragraph seven allows either party to  
 3 perform either role --

4 BY MR. SCHAFFER:

5 Q Okay. Now --

6 A -- as long as they can describe in detail  
 7 what material conditions the other party has failed  
 8 to perform.

9 Q I'll ask you to take a look, and take  
 10 your time, go through Exhibit 31 and I'll ask you  
 11 to find all of the termination events that are

[186:8] - [195:22]

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5 A The one we were just -- I just read from  
 6 when you asked me the question, I meant paragraph  
 7 seven.

8 Q Okay. Now, paragraph eight of the  
 9 version proffered with Exhibit 30 --

10 A Right.

11 Q -- explicitly said that if there was a  
 12 material breach condition, that there could be a  
 13 termination by SAGA, didn't it?

14 A Yes.

15 Q Now, that's not contained in paragraph  
 16 seven of the version that you signed in Exhibit 31,  
 17 correct?

18 MR. BASINGER: Object to the form of the  
 19 question. You may answer.

20 THE WITNESS: Okay. It is. And I read  
 21 it a couple times already and I'll try again.  
 22 Okay? We may disagree over whether I've read it or  
 page 187

1 not, but here it is. "Shall give written notice to  
 2 the other party describing in detail what material  
 3 conditions the other party has failed to perform."

4 In other words, paragraph seven requires  
 5 that the terminating party, whether it's SAGA or  
 6 Consist, describe to the other party, whether  
 7 that's SAGA or Consist, exactly what material  
 8 conditions of the contract -- and material  
 9 conditions of the contract is a term of art here,  
 10 it's got a small M and a small C, okay, and I've  
 11 told you what at least one of them was starting at  
 12 the beginning of the contract. There are others  
 13 and there are a bunch that are implied by American  
 14 contract law.

15 BY MR. SCHAFFER:

16 Q Well, explain to me, Mr. Daly, why then  
 17 paragraph eight of the version annexed to  
 18 Exhibit 30 has its first sentence whatsoever.

19 A In here, the old one (indicating)?

20 Q Yes. Why does the first sentence exist  
 21 in paragraph eight?

22 A It was probably carried forward from an  
 page 188

1 earlier version.

2 Q Is that a standard Software AG contract?

3 A The contract with Natalio was never a  
 4 standard form.

5 Q So --

6 A You can see that it was modified,  
 7 paragraphs were inserted and deleted. The fact  
 8 that paragraph six and seven are duplicates is a  
 9 fact that it was a work in progress.

10 Q Okay.

11 A But it wasn't presented to Software AG --  
 12 to Consist for signature.

13 Q Okay. So take a look again at paragraph  
 14 seven of Exhibit 31.

15 A Got it.

16 Q And it says, "Before any termination of  
 17 this agreement shall be effective, the terminating  
 18 party shall give written notice." Do you see that?

19 A Uh-huh.

20 Q And when I asked you for the termination  
 21 events that are explicitly stated in this contract,  
 22 you skipped over paragraph one, didn't you?

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1 MR. BASINGER: Object to the form of the  
 2 question. You may answer.

3 THE WITNESS: Yes.

4 BY MR. SCHAFFER:

5 Q Why is that?

6 A Because paragraph one's termination is  
 7 not for material breach. Seven doesn't apply to  
 8 one. They're not connected. They're not the same  
 9 thing.

10 Q Doesn't paragraph seven say "any  
 11 termination"?

12 A Yes.

13 Q And isn't the only termination that's  
 14 explicitly referenced in this agreement the  
 15 termination that's contained in paragraph one?

16 MR. BASINGER: Object to the form of the  
 17 question. You may answer.

18 THE WITNESS: No. No, there's a  
 19 termination in paragraph seven of 31 and there's a  
 20 termination in paragraph one. Paragraph one is  
 21 termination without cause, paragraph seven is

22 termination with cause due to the breaching of a  
page 190

1 material condition that you failed to perform and  
2 after 60 days you still didn't get it right.

3 BY MR. SCHAFFER:

4 Q Does paragraph seven of Exhibit 31 say  
5 anything about termination for material breach?

6 A That's exactly what it covers. "The  
7 terminating party shall give written notice to the  
8 other party" -- for there to be a terminating party  
9 there has to be a termination. Before the  
10 termination can become effective, you have to give  
11 written notice to the other party describing in  
12 detail what material conditions -- so you've got to  
13 have a material condition --

14 Q Now --

15 A -- the other party has failed to perform,  
16 and then the other party will have the 60-day cure  
17 period.

18 Q Now, paragraph seven refers to any  
19 termination, does it not?

20 MR. BASINGER: Objection. Asked and  
21 answered. You may answer.

22 BY MR. SCHAFFER:

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1 Q Isn't that what the words say?

2 A The -- the -- the phrase taken out of  
3 context says that, but in context it doesn't, no.

4 Q In context of -- well --

5 A Of paragraph seven.

6 Q Take a look at paragraph eight of  
7 Exhibit 30.

8 A Okay. Right. "Before such termination  
9 shall become effective."

10 Q Now, the word "such" refers to material  
11 breach, doesn't it --

12 MR. BASINGER: Objection.

13 BY MR. SCHAFFER:

14 Q -- that's referred to in the first  
15 sentence that's been taken out of Exhibit 31?

16 MR. BASINGER: Object to the form of the  
17 question. You may answer.

18 THE WITNESS: It -- it appears to, yeah.

19 BY MR. SCHAFFER:

20 Q Okay.

21 A I mean that -- that's one interpretation  
22 you can make, yes.

page 192

1 Q Okay. And it's quite clear under that  
2 version that paragraph eight is referring to cause,  
3 whereas paragraph one is not referring to cause;  
4 isn't that right?

5 A The situation is the same in both.

6 Q But in one there's a sentence that  
7 appears that makes it very, very clear and in the  
8 second version there's one that refers to any  
9 termination. Do you see that?

10 MR. BASINGER: Object to the form of the  
11 question. You may answer.

12 THE WITNESS: I -- I see it, but I think  
13 we're speaking past each other.

14 BY MR. SCHAFFER:

15 Q Okay.

16 A Okay? This one which was not signed did  
17 not get finalized, 30, okay, has an explicit right  
18 for SAGA, in paragraph eight, to terminate, it's  
19 unilaterally --

20 Q Correct.

21 A -- for material breach.

22 Q Correct. And that version was not

page 193

1 accepted, correct?

2 A This one over here is bilateral. Either  
3 one can terminate for material breach. Okay? So  
4 they both, except for the bilateral nature of this  
5 one, say the same thing.

6 Could the wording -- could -- could there  
7 be an improvement? There's always room for --  
8 after a case arises, there's always room for  
9 improvement.

10 Q Okay. Well --

11 A But this contract says that material  
12 breach conditions can be terminated differently.  
13 It makes no reference -- there's no reference in  
14 paragraph seven to one, paragraph one.

15 Q This agreement, you're pointing to  
16 Exhibit 31?

17 A Is 31.

18 Q You also agree with me that paragraph  
19 seven says "any termination," and it doesn't say  
20 other than the termination set forth in paragraph  
21 one, does it?

22 MR. BASINGER: Objection to the form of  
page 194

1 the question. You may answer.

2 THE WITNESS: Literally it doesn't say  
3 that, but it's not necessary to say it if it's in  
4 the same paragraph defining the termination. So  
5 it's a -- it's a choice in drafting that doesn't  
6 affect the meaning in paragraph seven.

7 BY MR. SCHAFFER:

8 Q Well, you've been drafting contracts  
9 since you got out of law school, Mr. Daly, right?

10 A Uh-huh.

11 Q And you view yourself as being a careful  
12 draftsman --

13 A Right.

14 Q -- a good draftsman?

15 Don't you think that that paragraph can  
16 reasonably be read as saying that the termination  
17 that's contained in paragraph one is governed by  
18 the procedure that's set forth in paragraph seven?

19 A No.

20 Q You don't believe that?

21 A No.

22 Q Okay.

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1 A In my mind that's an -- that's an  
2 impossible construction.

3 Q And would it have been an impossible  
4 construction had you left in the sentence that was  
5 deleted from paragraph eight of Exhibit 30, which  
6 said that SAGA reserved the right to terminate for  
7 failure to perform material conditions of the  
8 agreement, and simply had made that a bilateral  
9 provision and, therefore, both parties would have  
10 clearly had the right to terminate after 60 days of  
11 noncure of a material condition as well as for no  
12 reason at all under paragraph one?

13 MR. BASINGER: Objection to the form of  
14 the question. Calls for speculation. You may  
15 answer to the extent you're able.

16 MR. SCHAFFER: Well, Mr. Daly is an  
17 experienced contract draftsman. He said he's  
18 drafted over 500 contracts or been responsible for  
19 them. I want to get his view as to whether that  
20 would have not been a very clear way of saying what  
21 he now says this contract says.

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1 answer.

2 THE WITNESS: Yeah. I -- I don't think I  
3 agree for the reason I stated previously.

[199:11] - [201:4]

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11 Q Now, take a look at paragraph seven of  
12 Exhibit 31.

13 A I'm there.

14 Q And we determined before that paragraph  
15 seven to Exhibit 31 changed the previous draft,  
16 paragraph eight of Exhibit 30, by saying "before  
17 such termination shall be effective" to "before any  
18 termination."

19 Do you agree that what you've just told  
20 me would have been perfectly clear if you had said  
21 in paragraph seven of Exhibit 31 "before any  
22 termination for failure to perform a material

page 200

1 condition of this agreement is effective," et  
2 cetera, continuing on the paragraph, and that would  
3 have made it very clear that the termination right  
4 was available for failure to perform material  
5 condition after only 60 days of noncure?

6 MR. BASINGER: Objection to the form of  
7 the question. You may answer.

8 THE WITNESS: The -- the only agreement I  
9 can give to your statement is that knowing what has  
10 transpired between the parties could I improve this  
11 language to remedy this situation. In my mind  
12 every contract is always improvable. I do not  
13 think that the way this is written it precludes the  
14 termination I described.

BY MR. SCHAFFER:

16 Q But it doesn't compel it either?

17 MR. BASINGER: Objection to form. You  
18 may answer.

19 THE WITNESS: It doesn't compel it unless  
20 they fail to correct in 60 days.

21 MR. BASINGER: Clarification. I think by  
22 compel it he means your understanding.

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BY MR. SCHAFFER:

2 Q Is your understanding compelled by the  
3 reading of this contract?

4 A No.

[202:12] - [203:22]

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12 Q Okay. Now, you testified earlier that  
13 one of the things that Mr. Fridman was quite  
14 insistent about was obtaining, as you described it,  
15 a perpetual agreement; is that correct?

16 A (Nodding.)

17 MR. BASINGER: Object to the form. You  
18 may answer.

BY MR. SCHAFFER:

20 Q Do you remember that testimony?

21 MR. BASINGER: Same objection.

22 THE WITNESS: I remember our discussion,

page 203

1 questions and answers, yes.

BY MR. SCHAFFER:

3 Q Yeah, you remember the discussion about  
4 that.

5 Do you believe that Mr. Fridman's reading  
6 of this contract as being perpetual is an  
7 unreasonable reading given that you've I think  
8 testified that he did not ever say to you that he  
9 was giving up on his insistence that the agreement  
10 be a perpetual agreement?

11 MR. BASINGER: Object to the form. You  
12 may answer.

13 THE WITNESS: Well, you know, did he ever  
 14 agree to it? My answer would have to be yes, he  
 15 agreed to the language because I believe there's a  
 16 copy executed by him which contains this language.  
 17 BY MR. SCHAFFER:  
 18 Q Yes.  
 19 A So I do believe, therefore, I think  
 20 there's only one legal conclusion, was that he  
 21 consented it to because I believe it has an  
 22 integration clause.

[205:14] - [207:11]

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14 Q Before when you were describing to me why  
 15 you believed that a reading of the contract which  
 16 would provide for termination only at specific  
 17 times and only for an uncured material breach was  
 18 unreasonable was a situation where there could be a  
 19 material failure to perform a condition or, better  
 20 put, a failure to perform a material condition of  
 21 the contract left uncured at the very outset of the  
 22 term of the contract and the other party would be

page 206

1 unable to terminate the contract until the next  
 2 termination date, which, in the example that you  
 3 were describing, could have been nine and-a-half  
 4 years later. Do you remember saying that?

5 MR. BASINGER: Objection to the form.  
 6 You may answer.

7 THE WITNESS: The example I gave, yes.  
 8 BY MR. SCHAFFER:

9 Q That's the example you gave.  
 10 Now, you're very familiar with contracts,  
 11 are you not, Mr. Daly?

12 MR. BASINGER: Objection to form. You  
 13 may answer.

14 THE WITNESS: I like to think of myself  
 15 as being very familiar in American contract law.

16 BY MR. SCHAFFER:

17 Q And after having contracted and  
 18 negotiated over 500 of them, I think you would  
 19 probably qualify as a contract expert.

20 Is termination of a contract the only  
 21 contract remedy that a party has if there is a  
 22 material failure to perform a condition?

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1 MR. BASINGER: Object to the form. You  
 2 may answer.

3 THE WITNESS: No. Our hope, expectation  
 4 and language wished for a repair hopefully within  
 5 60 days to incentivize some movement. So we were  
 6 eternal optimists that if there was a material  
 7 breach, we notified the other side that termination  
 8 would be the most unlikely event, that what would  
 9 be likely is by sitting down, reasoning we would  
 10 come to a 60-day solution and we would proceed  
 11 onward.

12 BY MR. SCHAFFER:

13 Q And let's assume for the moment that --

14 A That was our thinking.

[214:4] - [217:22]

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4 Q Withdrawn.

5 The nonbreaching party would bear the  
 6 burden of demonstrating that there is a material  
 7 failure to perform a condition of the contract; is  
 8 that correct?

9 MR. BASINGER: Objection to the form.



10 You may answer.

11 THE WITNESS: That's right, and I believe  
12 that's what the intent of seven is.

13 BY MR. SCHAFFER:

14 Q Okay.

15 A "The terminating party shall give written  
16 notice to the other party describing in detail what  
17 material conditions the other party has failed to  
18 perform, and the other party shall have 60 days in  
19 which to perform such conditions."

20 Q What does "in detail" mean in your view?

21 A Sufficient detail to give notice of what  
22 is wrong. In other words, what has been done wrong

page 215

1 and what needs to be done to rectify it.

2 Q And if the nonbreaching party fails to  
3 give notice in that detail such that the  
4 nonbreaching party cannot determine what it is that  
5 the nonbreaching party is claiming is wrong with  
6 their performance, that would be insufficient  
7 notice under paragraph seven in your view?

8 MR. BASINGER: Objection to the form.

9 You may answer.

10 BY MR. SCHAFFER:

11 Q Did you understand the question?

12 A I understand your question. You're  
13 saying if --

14 MR. BASINGER: Same objection.

15 THE WITNESS: -- I give you notice and  
16 it's inadequate or unintelligible to you, then it  
17 doesn't work. And my response to that is let's be  
18 real, let's be business like. If I send you a  
19 notice of material breach of a contract and I say  
20 you have 60 days in which to repair it and you  
21 don't understand it, your response is not to sit  
22 back 59 days, your response is to send me a letter

page 216

1 back saying dear, Mr. Daly, I received your notice,  
2 I wish to repair, I need further information on A,  
3 B, C, D.

4 BY MR. SCHAFFER:

5 Q And if the nonbreaching party or the  
6 notifying party fails to give a response to that,  
7 what conclusion would you draw --

8 MR. BASINGER: Objection to the form.

9 You may answer.

10 BY MR. SCHAFFER:

11 Q -- under the contract -- what conclusion  
12 would you draw under the contract?

13 MR. BASINGER: Same objection.

14 THE WITNESS: I -- I think you're asking  
15 me what if the nonbreaching party didn't give it --  
16 even on the second attempt doesn't give the right  
17 information.

18 BY MR. SCHAFFER:

19 Q Or refuses to give information.

20 A That's one example of not giving adequate  
21 information, is to give zero information, it's a  
22 null case. But I would say that the -- the

page 217

1 exchange would -- would continue until they got the  
2 information.

3 With major corporations -- we're not  
4 dealing with individuals here. We're dealing with  
5 major corporations -- an exchange of information  
6 like that reaches an executive. You -- you climb  
7 the management tree and find someone who does  
8 respond. You don't just say well, 58 days and I  
9 got these guys, all I got to do now is sit back and  
10 wait. You don't do that. Reasonable businessmen  
11 at this level, multi, multi-million dollar



12 corporations, don't behave childishly or  
 13 irrationally.  
 14 Q Now --  
 15 A They pursue.  
 16 Q Now, have you ever seen in your career an  
 17 intellectual software contract or license which is  
 18 perpetual and which cannot be terminated even for  
 19 material breach?  
 20 A I have never in my career, 1981 until  
 21 today, 26 years, seen a contract that cannot be  
 22 terminated for a true material breach.

[229:10] - [235:14]

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7 BY MR. SCHAFFER:  
 8 Q Okay.  
 9 A -- to...  
 10 Q Okay. I'm going to ask the reporter to  
 11 mark this document as Exhibit 34.  
 12 (Daly Exhibit Number 34 was  
 13 marked for identification.)  
 14 BY MR. SCHAFFER:  
 15 Q Have you ever seen Exhibit 34 before,  
 16 Mr. Daly?  
 17 A Yeah.  
 18 Q What is Exhibit 34?  
 19 A That's the signed, executed by both  
 20 parties copy of the distributorship agreement in  
 21 question.  
 22 Q Now, Exhibit 33 asks Mr. Fridman to sign

page 230

1 the revised Annex A and to initial all pages and  
 2 then return them to you for a fully executed  
 3 version; is that correct?  
 4 A And I believe we had that Annex A in  
 5 here, yes.  
 6 Q Okay. Can you explain to us why you  
 7 asked Mr. Fridman to initial each page and sign and  
 8 date the signature page in the cover letter to  
 9 Exhibit 33?  
 10 A Let's see. Thirty-three.  
 11 Q Page CSS-92.  
 12 A Yeah. I would have asked him to --  
 13 well -- okay. This 33 would have gone with 31.  
 14 This is the also included letter. Okay? So I  
 15 would have asked him to, you know, sign both  
 16 original agreements. I would have sent him two  
 17 originals. And then the -- and -- and replace  
 18 Annex A, as I said in the -- in the transmittal  
 19 letter on -- on 34. So make this your Exhibit A  
 20 instead of the one in 31 of September 9th, or this  
 21 is September 18th rather. And then after that's  
 22 finished, on both originals initial each page, sign

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1 and date the signature page and return both  
 2 originals to me.  
 3 Q Okay. And Exhibit --  
 4 A So it was executional instructions.  
 5 Q And Exhibit 31, by the way, on page nine,  
 6 Exhibit A also changed the baseline year royalty to  
 7 7 and-a-half million dollars from \$8 million,  
 8 didn't it?  
 9 MR. BASINGER: Object to the form. You  
 10 may answer.  
 11 THE WITNESS: I don't have an Exhibit A  
 12 on my --  
 13 BY MR. SCHAFFER:  
 14 Q Exhibit --  
 15 A -- 34.  
 16 Q I'm sorry. It's Exhibit 31. Annex A to

17 Exhibit 31.  
18 A Exhibit 31 has Exhibit A.  
19 Q And Exhibit A, paragraph three --  
20 A Right.  
21 Q -- establishes a baseline royalty of 7  
22 and-a-half million dollars, correct?  
page 232  
1 A Right.  
2 Q Which was a compromise between the  
3 position that Mr. Fridman was advocating and the  
4 position that Software AG was advocating; is that  
5 correct?  
6 A Well, it conceded to Mr. Natalio's  
7 request for 7 million because he was going to pay 7  
8 and-a-half, but he was going to receive a one-time  
9 credit of 500,000 towards his year 2000 Toolkit  
10 payments. So, in effect, he was paying for two  
11 things with the 7 and-a-half million. He was  
12 paying 7 million for the agreement and he was  
13 getting a half a million credit to the Year 2K  
14 usage.  
15 Q Okay.  
16 A So he got his 7 million in the end.  
17 Q And we saw that Exhibit 33 is dated  
18 September 18th, correct?  
19 A September 18th is 33, yes.  
20 Q Okay. Now, were you, as the negotiator  
21 for SAGA of the agreement reflected in Exhibit 34,  
22 under any time pressure to conclude that agreement  
page 233  
1 with Mr. Fridman?  
2 A Well, the only time pressure was we  
3 wanted to have an agreement in place on January 1  
4 of '98. We wanted to be under agreement by  
5 January 1 of '98.  
6 Q Well, isn't it a fact, Mr. Daly, that at  
7 around this time, meaning August, September of  
8 1997, there was an IPO underway for SAGA's stock?  
9 A I agree -- I believe that was true, yes.  
10 Q And was it important for SAGA to have the  
11 Distributorship Agreement with Consist in place for  
12 purposes of the IPO?  
13 A It was considered -- it was considered  
14 positive, not -- not a drop-dead condition, but --  
15 but very much desired that it be in place because  
16 it was mentioned in the prospectus that it was  
17 being negotiated.  
18 Q And who was it that viewed it as a  
19 positive? Was it something that the investment  
20 bankers wanted or was it something --  
21 A Right. Thayer Capitol wer the investment  
22 bankers and the, as you know, in an IPO it's not  
page 234  
1 just the -- the banker for the firm, but it's the  
2 coalition that they put together of other bankers  
3 who all contribute to reviewing and perfecting the  
4 prospectus.  
5 Q And --  
6 A And they all felt as a group, I remember,  
7 that the agreements with the affiliates were an  
8 important part of the company's bottom line.  
9 Q Okay.  
10 A If not top line, bottom line.  
11 Q Okay. And was it important for the IPO  
12 process to have in place a distributorship  
13 agreement that had a predictable stream of revenue  
14 for SAGA?  
15 A That was considered a very important  
16 asset, yes.  
17 Q And the predictable stream of revenue in  
18 particular that's reflected in Exhibit A to --

19 A I have an Annex A and B. I don't have  
 20 the exhibit on mine. Is it -- and this is a new  
 21 Annex A in 33, so it's not there. But there's a --  
 22 there's a page -- yeah. "Make payments to SAGA as  
 page 235  
 1 provided in Exhibit A hereto." So there's an  
 2 Exhibit A somewhere.  
 3 Q We had just actually looked at Exhibit A,  
 4 but I can't find it now. But in any event, the  
 5 revenue stream that was reflected in Exhibit A to  
 6 the Distributorship Agreement, which we looked at a  
 7 few moments ago, was an important feature of the --  
 8 A Oh, yeah.  
 9 Q -- IPO process; is that correct?  
 10 A The revenue -- the revenues to be paid by  
 11 Consist to Software AG?  
 12 Q Yes.  
 13 A Yes.  
 14 Q Okay.  
 15 A We have one in 39 as the -- but it was,  
 16 as you say, we have an Exhibit A, but it's to --  
 17 it's not the signed version. It's Number 31.

[258:21] - [259:12]

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18 THE WITNESS: It's not an end to the  
 19 entire agreement between us. It's -- it's  
 20 conceivably remediable.  
 21 BY MR. SCHAFFER:

22 Q Mr. Daly, will you be at trial in this  
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1 matter on December 12th?  
 2 A I will be instructed by Mr. Basinger or  
 3 by Baker & McKenzie where to show up if I'm needed.  
 4 (Brief recess.)  
 5 MR. SCHAFFER: I have no further  
 6 questions, Mr. Daly, and I thank you very much for  
 7 your time today.  
 8 MR. BASINGER: I have no questions at  
 9 this time.

10 (Whereupon, at 5:00 p.m., the  
 11 deposition of JAMES H. DALY  
 12 was concluded.)

13 \* \* \* \* \*  
 14  
 15

[260:1] - [260:19]

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20  
 21  
 22

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1 CERTIFICATE OF NOTARY PUBLIC  
 2 I, SHARI R. BROUSSARD, the officer before whom  
 3 the foregoing deposition was taken, do hereby  
 4 certify that the witness whose testimony appears in  
 5 the foregoing deposition was duly sworn by me; that  
 6 the testimony of said witness was taken by me in  
 7 stenotypy and thereafter reduced to typewriting  
 8 under my direction; that said deposition is a true  
 9 record of the testimony given by said witness; that  
 10 I am neither counsel for, related to, nor employed  
 11 by any of the parties to the action in which this  
 12 deposition was taken; and, further, that I am not a  
 13 relative or employee of any counsel or attorney  
 14 employed by the parties hereto, nor financially or  
 15 otherwise interested in the outcome of this action.  
 16

17  
18 SHARI R. BROUSSARD  
Notary Public in and for the  
19 District of Columbia  
20  
21 My commission expires:  
22 July 14, 2010

[261:4] - [261:10]

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1 A C K N O W L E D G E M E N T O F D E P O N E N T  
2  
3  
4 I, JAMES H. DALY, do hereby acknowledge I  
5 have read and examined the foregoing pages of  
6 testimony, and the same is a true, correct and  
7 complete transcription of the testimony given by me,  
8 and any changes or corrections, if any, appear  
9 in the attached errata sheet signed by me.  
10  
11  
12  
13

Dated: New York, New York  
December 3, 2007

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